Supreme Court, U.S.
FILED

01165 0 MAY - 7 2002

OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

STEVEN B. DeVRIES,

Petitioner,

vs.

STATE OF IOWA,

Respondent.

On Petition For A Writ Of Certiorari To The Iowa Supreme Court

PETITION FOR WRIT OF CERTIORARI

JOSEPH G. BERTOGLI
Counsel of Record
The Plaza, Suite 270
300 Walnut Street
Des Moines, Iowa 50309
515/244-7820

May 7, 2002

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

33 pp

QUESTION PRESENTED

Whether the Petitioner was denied due process under the Fourteenth Amendment to the United States Constitution when, after properly excluding the results of an intoxilyzer test, the Iowa Court of Appeals nonetheless upheld the Petitioner's conviction because it found other evidence to support the trial Court's guilty verdict.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

PETITION FOR A WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTION 1

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS 2

STATEMENT OF THE CASE 2

A. Procedural Background 2

B. Factual Background 4

C. Decision of the Iowa Court of Appeals 5

ARGUMENT 6

CONCLUSION 11

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Chapman v. California, 386 U.S. 18 (1967) 7, 9, 11

Neder v. United States, 527 U.S. 1 (1999) 7, 11

United States v. Mett, 178 F.3d 1058 (9th Cir. 1999) 7, 9, 11

STATE CASES

State v. Forsyth, 547 N.W.2d 833 (Iowa App. 1996) 9

State v. Massey, 275 N.W.2d 436 (Iowa 1979) 9

State v. Melk, 543 N.W.2d 297 (Iowa App. 1995) 9

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. XIV 2, 10, 11

U.S. Const. art. XIV, §1 2

STATE STATUTES

Iowa Code §321J.2 (1999) 2, 4

Iowa Code §§321J.2(1)(a)(b) (1999) 4

RULES

Fed.R.Crim.P. 52(a) 7, 9

Sup. Ct. R. 10 1

Sup. Ct. R. 13 1

Iowa Rules of Appellate Procedure 27A 3

Iowa Rules of Appellate Procedure 402(c) 3

PETITION FOR A WRIT OF CERTIORARI

Petitioner Steven B. DeVries respectfully petitions for a writ of certiorari to review the judgment of the Iowa Supreme Court and Iowa Court of Appeals in this case.

OPINIONS BELOW

The ruling of the Iowa Supreme Court is unreported and is reprinted in the Appendix to the Petition ("Pet. App.") p. 18. The opinion of the Iowa Court of Appeals is unreported and is reprinted in Petitioner's Appendix at pages 1 through 8. The State District Court's finding of guilt is unreported and reprinted in Pet. App. at 14-15. The State District Court's Sentencing Order is unpublished and reprinted in Pet. App. at 6-17. The State District Court's Memorandum and Ruling on Petitioner's Motion to Reconsider Ruling Denying Motion to Suppress is unreported and reprinted in Pet. App. at 9-13.

JURISDICTION

The Iowa Court of Appeals entered its opinion on December 12, 2001. On January 2, 2002 the Petitioner filed his Application for Further Review to the Iowa Supreme Court, the state court of last resort. On February 8, 2002 the Iowa Supreme Court entered its Order denying further review. The jurisdiction of this Court is invoked pursuant to Rules 10 and 13 of the Supreme Court Rules.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The due process clause of the United States Constitution provides, in relevant part, as follows: " . . . No State shall make or enforce any law which shall abridge the privileges of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law . . . " U.S. Const. art. XIV, §1.

STATEMENT OF THE CASE

The issue in this case is whether the Petitioner was denied his right to due process guaranteed to him under the Fourteenth Amendment to the United States Constitution when the Iowa Court of Appeals correctly excluded the results of an intoxilyzer test admitted at trial but failed to reverse the Petitioner's conviction for Operating While Intoxicated, Third Offense, by finding that the guilty verdict was supported by other evidence.

A. Procedural Background

On February 10, 2000, a trial information was filed charging the Petitioner with Operating While Intoxicated, Third Offense, in violation of Iowa Code §321J.2 (1999). Petitioner filed a Motion to Exclude Evidence on March 14, 2000 requesting that the results of the chemical analysis of his breath taken from him on or about January 13, 2000 be excluded. A hearing was held on Petitioner's Motion before the Honorable Associate District Court Judge James Birkenholtz on May 1, 2000. On May 24,

2000, the Court entered its ruling denying the Motion to Exclude Evidence. Pet. App. at 9.

Petitioner filed his Motion to Reconsider on June 1, 2000 and on July 11, 2000 the trial Court entered is Order denying Petitioner's Motion to Reconsider. Pet. App. at 9-13. On August 23, 2000, Petitioner waived his right to a jury trial and trial was held before Associate District Court Judge Carol S. Egly, who returned a verdict of guilty. Pet. App. at 14, 15.

On November 2, 2000, the Petitioner was sentenced to five years in prison and fined the sum of $2,500.00 plus 30% surcharge. Pet. App. at 15-17. Petitioner timely filed his Notice of Appeal that same day.

On December 12, 2001, the Iowa Court of Appeals entered its opinion in this matter agreeing with the Petitioner that the results of the intoxilyzer test should have been excluded from evidence at trial. The Petitioner's conviction was, however, affirmed as the Court of Appeals found that other evidence existed in demonstrating that the Petitioner was operating a motor vehicle while under the influence of alcohol. Pet. App. at 1-8. Petitioner filed a Petition for Rehearing pursuant to Rule 27A of the Iowa Rules of Appellate Procedure requesting that the Court of Appeals opinion be vacated. The Petitioner's Petition for Rehearing was denied on December 21, 2001.

On January 2, 2002, the Petitioner filed an Application for Further Review with the Iowa Supreme Court pursuant to Rule 402(c) of the Iowa Rules of Appellate Procedure requesting that the Iowa Court of Appeals opinion be vacated and that the Supreme Court of Iowa

reverse the Petitioner's conviction and remand the matter to the lower Court for a new trial. On February 8, 2002, the Iowa Supreme Court entered an Order denying the Application for Further Review. Pet. App. at 18.

B. Factual Background

On January 13, 2002 the Petitioner was arrested for Operating While Intoxicated, Third Offense, in violation of Iowa Code §321J.2 (1999). He was transported to the Polk County Jail where West Des Moines police officer Blain Brinkmeyer administered an intoxilyzer test using an 11-step operational checklist prepared by the Iowa Department of Public Safety. Pet. App. at 2.

Brinkmeyer ran the test three times. On the first two attempts, the machine failed to print out a breath alcohol content reading and the evidence cards were discarded. On the third attempt, Brinkmeyer placed an evidence card into the printer at the completion of Step 4 rather than at the beginning of Step 4 of the checklist and, as a result, did not obtain an "air blank" reading. The officer completed the balance of the checklist as prescribed and obtained a reading of .177. Pet. App. at 3.

The State charged the Petitioner with Operating a Motor Vehicle While Under the Influence of Alcohol or While having a .10 Alcohol Concentration. Iowa Code §§321J.2(1)(a)(b) (1999). Petitioner moved to suppress the breath test results asserting that Officer Brinkmeyer did not properly operate the intoxilyzer machine. The District Court denied the Motion to Suppress as well as Petitioner's Motion to Reconsider. Following Petitioner's Waiver of Jury Trial, the trial Court entered a finding of

guilt and sentenced him a prison term not to exceed five years as well as fining him $2,500.00 plus 30% surcharge. Pet. App. at 3.

C. Decision of the Iowa Court of Appeals

The Iowa Court of Appeals affirmed the Petitioner's conviction. First, the Court of Appeals correctly determined that the standard of review to be applied was for a correction of errors at law rather than the abuse of discretion standard urged by the State. Pet. App. at 3-4.

Next, the Court of Appeals held that the State failed to prove that the intoxilyzer test was administered pursuant to the methods approved by the Commissioner of Public Safety. The Court of Appeals correctly noted that the officer's failure to proceed in accordance with the Department's required steps was an omission that would mandate suppression of the breath test on its own. The Court of Appeals went one step further and determined that even if it were to agree with the trial Court that the officer's deviation from protocol may be ignored if the test result was found to be accurate and reliable the State failed to establish its burden that the test result was both accurate and reliable because the State criminalist's opinion that the third test was reliable was based on the assumption that the first two test runs were accurate and reliable. Accordingly, the Court of Appeals found that the Petitioner's Motion to Suppress the test and test result should have been granted. Pet. App. at 4-7.

Next, the Court of Appeals decided that reversal was not mandated because it found evidence supporting the alternate "under the influence" theory when charged by

the State even though the State did not argue that the evidence was sufficient to support the judgment on this alternate ground. Pet. App. at 7. The evidence relied upon by the Iowa Court of Appeals consisted of the following:

1.) Brinkmeyer stated that while he was investigating the presence of an unattended vehicle on the interstate, a car drove up and parked behind him;

2.) Petitioner got out of the driver's side of the car and approached Brinkmeyer;

3.) The officer "noticed a strong odor of alcohol coming from Petitioner";

4.) He noted that the Petitioner had "watery/bloodshot eyes and slurred speech";

5.) Brinkmeyer administered three field sobriety tests and in his opinion, the Petitioner failed the "walk-and-turn" and the "one-leg-stand" tests while passing the "horizontal-gaze-nystagmus" test.

Pet. App. at 8.

ARGUMENT

This case presents an important and recurring issue where a state court of last resort has entered a ruling denying an individual his right to due process of law in a way that conflicts with both relevant decisions of this Court and decisions of the United States Court of Appeals.

After the Iowa Court of Appeals found that Petitioner's Motion to suppress the results of the intoxilyzer

test should have been granted and ruled that the test results were inadmissible at trial, its inquiry should have been, "Did the omission of the intoxilyzer test amount to 'harmless error'?" Instead, the Iowa Court of Appeals queried, "Did other evidence support the guilty verdict?"

Once an appellate Court has found an error the question becomes whether the error warrants reversal of the conviction or sentence. Acknowledging that all 50 states had adopted some sort of harmless error rule, this Court held in *Chapman v. California*, 386 U.S. 18 (1967), that even a Federal Constitutional error could be harmless. Similarly, Fed.R.Crim.P. 52(a) provides that "[a]ny error, defect, irregularity or variance which does not affect substantial rights shall be disregarded."

When the harmless error rule applies, it is the government who bears the burden to prove the Federal Constitutional rule to be harmless beyond a reasonable doubt. *Neder v. United States*, 527 U.S. 1 (1999). If the error is not constitutional, the government must prove that the prejudice resulting from the error was more likely than not harmless. *United States v. Mett*, 178 F.3d 1058 (9th Cir. 1999).

In this case, the trial court's findings are not specific as to what evidence was relied upon by the Court in arriving at its verdict of guilty. Additionally, the court's verdict did not determine upon which charging theory it was basing its verdict upon. Pet App. at 14-15. The minutes of testimony used by the trial court includes the case investigation report of Officer Brinkmeyer. Officer Brinkmeyer's report contains his opinion that the Petitioner failed two of three field sobriety tests and also

contained the results of the intoxilyzer test which indicated a result of .177 BAC.

The State charged that the Petitioner did operate a motor vehicle while under the influence of an alcoholic beverage or other drug, or a combination of such substances or while having ten hundredths (.10) or more alcohol concentration or any amount of controlled substances is present in the person as measured in the person's blood or urine. Since the Iowa Court of Appeals correctly determined that the results of the intoxilyzer test should not have been admitted at trial, the only evidence left to support any theory charged by the State was:

1.) The officer noticed a strong odor of alcohol coming from the Petitioner;

2.) The officer noted that the Petitioner had watery, bloodshot eyes and slurred speech;

3.) The Petitioner failed the "walk-and-turn" and the "one-leg-stand" field sobriety tests.

On the other hand, the following evidence even taken in the light most favorable to the State establishes no indicia of guilt whatsoever:

1.) While the officer was investigating the presence of an unattended vehicle on the interstate, a car drove up and parked behind him;

2.) The Petitioner got out of the driver's side of the car and approached the officer;

3.) The Petitioner consented to the "horizontal-gaze-nystagmus" field sobriety test and no indication of nystagmus was present.

Certainly, the State here did nothing to establish that the prejudice resulting from the trial Court's error admitting the intoxilyzer test results was more likely than not harmless. *See United States v. Mett*, 178 F.3d 1058, 1066 (9th Cir. 1999).

Utilizing the harmless error doctrine as set forth by this Court's ruling in *Chapman* as well as using the harmless error rule contained in Rule 52(a) of the Federal Rules of Criminal Procedure,[1] it was not the job of the Iowa Court of Appeals to look for other evidence which may support the trial court's guilty verdict in this case. Having determined that error occurred and evidence was admitted that should not have been admitted, it was a violation of the Petitioner's right to due process guaranteed by the Fourteenth Amendment for the Court of Appeals to attempt to find other evidence admitted at trial which may have supported the Court's guilty verdict. The Iowa Court of Appeals opinion simply failed to employ the harmless error doctrine as required. The Court of Appeals question should have been, "Did the omission of the intoxilyzer test contribute to the guilty verdict?" The answer to that question is undeniably, "Yes". Next, the Court of Appeals should have asked, "Did the Petitioner suffer prejudice as a result of the inclusion of the intoxilyzer test results?" Again, the undeniable answer is, "Yes".

---

[1] *State v. Melk*, 543 N.W.2d 297 (Iowa App. 1995); *State v. Forsyth*, 547 N.W.2d 833 (Iowa App. 1996); *State v. Massey*, 275 N.W.2d 436 (Iowa 1979).

Put simply, this was an OWI trial. The Petitioner failed in his efforts to exclude the results of the intoxilyzer test of .177 BAC. Since the allowable standard is .10 or more, .177 is undeniably much greather than .10. Accordingly, the intoxilyzer test result in this matter was a substantial factor utilized by the trial Court in arriving at its verdict. No other conclusion is either logical or reasonable.

Once the Iowa Court of Appeals concluded that the trial Court had committed an error in allowing the intoxilyzer test results to be admitted at trial its focus should have been turned to whether or not the error was harmless or not. Failing to employ the harmless error standard denied the Petitioner his right to due process of law because the Court of Appeals conducted a search for what other evidence supports a finding of guilt rather than asking the question, "Did the omission of the intoxilyzer test contribute to the guilty verdict and did the Petitioner suffer prejudice as a result of its inclusion as evidence at trial?" The correct employment of the harmless error standard by the Iowa Court of Appeals would undeniably produce an affirmative answer to these questions.

The due process clause of the Fourteenth Amendment is not limited to just a fair trial. It also applies to the appellate process. When an error as was committed by the Iowa Court of Appeals is revealed, there is but one remedy, reversal and retrial. The Petitioner must be placed in the same position as he was when a correct ruling on his pretrial Motion to Suppress should have been entered. Any other result in this case denies the Petitioner his fundamental right to due process under the

Fourteenth Amendment to the United States Constitution.

The Court of Appeals opinion is in direct conflict with this Court's ruling in *Chapman v. California*, 386 U.S. 18 (1967), and *Neder v. United States*, 527 U.S. 1 (1999) as well as the Ninth Circuit's opinion in *United States v. Mett*, 178 F.3d 1058 (9th Cir. 1999). Pursuant to the Supreme Court Rules, this Court must accept the Petitioner's Petition for Writ of Certiorari and reverse the Iowa Court of Appeals opinion affirming the Petitioner's conviction and enter an Order directing that Petitioner's conviction be reversed and that the case be remanded for a new trial below.

CONCLUSION

For the foregoing reasons, the Petitioner respectfully submits that the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

JOSEPH G. BERTOGLI
The Plaza, Suite 270
300 Walnut Street
Des Moines, Iowa 50309
515/244-7820
Attorney for Petitioner

IN THE COURT OF APPEALS OF IOWA

No. 1-650/00-1843
Filed December 12, 2001

STATE OF IOWA,
Plaintiff-Appellee,

vs.

STEVEN B. DEVRIES,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, James D. Birkenholtz and Carol S. Egly, District Associate Judges.

Defendant appeals from the judgment and sentence entered for third-offense operating while intoxicated. **AFFIRMED**.

Joseph G. Bertogli, Des Moines, for appellant.

Thomas J. Miller, Attorney General, Karen Doland, Assistant Attorney General, John P. Sarcone, County Attorney, and Ralph E. Marasco, Jr., Assistant County Attorney, for appellee.

Considered by Huitink, P.J., and Mahan and Vaitheswaran, JJ.

VAITHESWARAN, J.

Steven DeVries appeals his conviction for operating a motor vehicle while intoxicated, third offense. He claims the results of an Intoxilyzer test were invalid because a police officer did not properly operate the machine. Although we agree with him, we uphold the conviction on the basis of other evidence demonstrating he was

operating the vehicle while under the influence of alcohol.

I. Background Facts and Proceedings

West Des Moines police officer Blain Brinkmeyer arrested DeVries after he failed field sobriety tests. DeVries agreed to provide a breath sample. Brinkmeyer, a certified Intoxilyzer 4011A operator, administered the test using an eleven-step operational checklist prepared by the Iowa Department of Public Safety.[1]

---

[1] The checklist is as follows:

1. Turn "Power" switch to "ON" and wait for green "Ready Light" to come on (if instrument is off).

2. Observe subject for at least 15 minutes prior to testing. The subject may not smoke, eat or drink for at least 15 minutes before testing.

3. Turn mode selector to "Zero Set", depress "Zero Adjust" and adjust to read non-minus .000, .001, .002, or .003.

4. Place evidence card in card printer, connect air hose to breath hose, turn mode selector to "Air Blank" and allow instrument to run through cycle.

5. Turn mode selector back to "Zero Set" and readjust "Zero".

6. Turn mode selector to "Calibrator", place Calibration filter in slot and allow instrument to run through cycle.

7. Calibration reading 0. ___ Filter Value 0. ___

8. Remove Calibration filter. Turn mode selector to "Air Blank", and allow to run through cycle.

9. Turn mode selector to "Breath" mode. Disconnect air hose from breath hose, insert disposable mouth piece in breath hose, instruct subject to blow into

Brinkmeyer ran the test three times. On the first two attempts, the machine failed to print out a breath alcohol content reading and the evidence cards were discarded. On the third attempt, Brinkmeyer placed an evidence card into the printer at the completion of step 4 rather than at the beginning of step 4 of the protocol and, as a result, did not obtain an "air blank" reading. The officer completed the balance of the checklist as prescribed, and obtained a reading of .177.

The State charged DeVries with operating a motor vehicle while under the influence of alcohol or while having .10 or more alcohol concentration. Iowa Code §§ 321J.2(1)(a),(b) (1999). DeVries moved to suppress the breath test result, claiming Brinkmeyer did not properly operate the Intoxilyzer machine. The district court denied the motion to suppress as well as DeVries' motion to reconsider. Following DeVries' stipulation to the minutes of testimony, the district court sentenced him to a prison term not exceeding five years. This appeal followed.

II. Scope of Review

DeVries claims the district court "misapplied the facts and misinterpreted the law" relating to the foundation for the admission of the breath test. The parties

---

mouthpiece for as long as possible. Green "Breath" light will turn on when proper sample is being given.

10. Breath Alcohol Concentration (grams Alcohol/ 210 Liters Breath) 0. ___

11. Reconnect air and breath hoses, turn selector to "Air Blank", and allow instrument to run through cycle.

disagree as to whether we should review this issue for errors of law or for abuse of discretion.[2] As DeVries is challenging the district court's reading of a statute and cases construing it, we conclude our review is on error. *See State v. Zell*, 491 N.W.2d 196, 198 (Iowa Ct. App. 1992).

III. Motion to Suppress

To establish a foundation for admission of a breath test, the State must first show the test was administered pursuant to methods approved by the Commissioner of Public Safety. Iowa Code § 321J.15; *Zell*, 491 N.W.2d at 198. Second, the State must establish the accuracy and reliability of the test result. *Geinzer*, 406 N.W.2d at 458. DeVries contends the district court erred in requiring the State to only prove the second element. We agree. Our court has framed the test conjunctively, stating, "it would be anomalous for us to hold that the mere following by rote of the prescribed methods is sufficient to render the test results admissible under [the predecessor statute]." *Id.* Therefore, the State was required to establish both elements to have the breath test admitted.

With respect to the first element, a Department of Public Safety criminalist conceded Officer Brinkmeyer

---

[2] *Cf. State v. Shortridge*, 589 N.W.2d 76, 81 (Iowa Ct. App. 1998) (stating review of evidentiary rulings is for abuse of discretion); *State v. Geinzer*, 406 N.W.2d 457, 458 (Iowa Ct. App. 1987) (reviewing foundation for admission of breath test on error); *see also State v. Taylor*, 587 N.W.2d 604, 605-6 (Iowa 1998) (noting sufficiency of required foundation reviewed for abuse of discretion but necessity of foundation reviewed for errors of law).

did "not entirely" proceed in accordance with the department's protocol and further stated "I would always recommend the officer follow the procedure set out in the operational check list." Therefore, the State failed to prove procedural compliance with its own standards. This omission alone mandated suppression of the breath test result.[3]

However, even if we were to agree with the district court that Officer Brinkmeyer's deviation from the protocol may be ignored if the test result is found to be accurate and reliable, we conclude the State failed to satisfy its burden on this second foundational element.

The State's criminalist opined that the test result was valid because readings garnered in step 7 of the protocol

---

[3] We do not ignore cases holding evidence admissible despite less than literal compliance with procedural requirements, where the noncompliance did "not endanger the defendant's health" or "the accuracy of the test." *State v. Schlemme*, 301 N.W.2d 721, 724 (Iowa 1981). *See also State v. Lindeman*, 555 N.W.2d 693, 697 (Iowa 1996); *State v. Wright*, 441 N.W.2d 364, 368 (Iowa 1989). However, these cases did not address procedures associated with the machine. *Cf. Geinzer*, 406 N.W.2d at 459 (holding admission of test results was prejudicial error where Intoxilyzer registered a reading of .01 rather than .00 on "air blank" step); *State v. Wolfe*, 369 N.W.2d 458, 460 (Iowa Ct. App. 1985) (where Intoxilyzer failed to print out reading and machine was not introduced to establish it was functioning properly, State failed in its burden of establishing accuracy and reliability); *State v. DeBerg*, 288 N.W.2d 348, 350 (Iowa 1980) (reversing defendant's conviction where State failed to show only new, factory-wrapped syringes had been used to withdraw blood). We believe non-compliance with the intoxilyzer protocol outlined here directly implicates the accuracy of the test.

were within acceptable limits. Additionally, the criminalist emphasized that the test result he reviewed was the culmination of three attempts, two of which, he had been advised, were conducted pursuant to the protocol. He admitted that if the officer had not conducted two test runs before obtaining the result on the third try, he would have been forced to conclude the evidence card from the third test would not reflect a valid test result.

DeVries' expert witness disagreed with the State criminalist's opinion that the test result was valid. She opined that Brinkmeyer's failure to obtain an air blank reading at step 4, prior to calibrating the machine at step 7, invalidated the breath test result because that step 4 reading was the means for determining whether the chamber was contaminated with alcohol. She also noted that while the evidence cards from the first two tests may have afforded insight into the contamination question, those cards were not introduced.

Normally, we would defer to a district court's assessment of dueling expert witnesses because that court is in a better position to judge the credibility of witnesses. *See State v. Jacobs*, 607 N.W.2d 679, 685 (Iowa 2000). However, we believe such deference is not warranted here because the State criminalist's opinion is based on a flawed assumption that the first two test runs were accurate and reliable.

Officer Brinkmeyer admitted that no reading printed out on either of the first two runs. He further admitted he had no explanation for why the readings did not print out. Although he speculated that the absence of a printout could have been caused by DeVries' failure to blow

enough air into the machine, he conceded that a green light, normally indicating the sufficiency of the air sample, came on both times. Additionally, the State criminalist's assertion that the light might not have been continuously lit, as required to generate a printout, was contrary to Officer Brinkmeyer's testimony that the light was on.

The absence of evidence cards for the first two runs despite an indication that there was sufficient air in the chamber effectively means that the first two runs were not reliable. Indeed, Brinkmeyer conceded as much in electing to proceed with a third run. As the State failed to establish the accuracy and reliability of the first two runs, it could not use them to bolster the accuracy and reliability of the third test. Therefore, contrary to the district court's determination, the State did not establish the second foundational element for admission of the breath test and DeVries' motion to suppress the test and test result should have been granted. Nevertheless, we are convinced reversal is not mandated, given evidence supporting the alternate "under the influence" ground charged by the State.

IV. Under the Influence

Iowa Code section 321J.2(1)(a) provides that a person commits the offense of operating while intoxicated if the person operates a motor vehicle "while under the influence of an alcoholic beverage. . . . " Although the State does not argue that the evidence is sufficient to support the judgment on this alternate ground, we may affirm on

any basis appearing in the record, whether urged or not. *State v. McCowen*, 297 N.W.2d 226, 227 (Iowa 1980).

DeVries stipulated to the minutes of testimony. Those minutes contain Officer Brinkmeyer's case investigation report detailing the circumstances preceding DeVries' arrest. Brinkmeyer stated that while he was investigating the presence of an unattended vehicle on the interstate, a car drove up and parked behind him. DeVries got out of the driver's side of the car and approached Brinkmeyer. The officer "noticed a strong odor of alcohol coming from DeVries." He also noted DeVries had "watery/bloodshot eyes, and slurred speech." Brinkmeyer administered field sobriety tests. DeVries failed the "walk and turn" and the "one-leg stand" tests. We believe this evidence is sufficient to support DeVries' judgment for operating while under the influence under Iowa Code section 321J.2(1)(a). *See State v. Murphy*, 451 N.W.2d 154, 158 (Iowa 1990); *State v. Pieper*, 432 N.W.2d 701, 704 (Iowa Ct. App. 1988).

AFFIRMED.

IN THE IOWA DISTRICT COURT FOR
POLK COUNTY

STATE OF IOWA Plaintiff, vs. STEVEN DeVRIES, Defendant.	Case Number OM 50793 RULING ON DEFENDANT'S MOTION TO RECONSIDER

The above captioned matter came before the Court on May 1, 2000, on the Defendant's Motion to Suppress. The Defendant, Steven DeVries, was represented at the hearing by Joseph G. Bertogli. The State of Iowa was represented by Ralph E. Marasco, Jr. On May 24, 2000, this Court entered a ruling denying the Defendant's Motion to Suppress. The Defendant filed a Motion to Reconsider pursuant to Iowa Rule of Civil Procedure 179(b), on June 1, 2000.

STATEMENT OF THE FACTS

On January 13, 2000, the Defendant was arrested by West Des Moines Police Officer Brinkmeyer and charged with operating a motor vehicle while intoxicated. The Defendant was subsequently taken to the West Des Moines Police Station where he consented to taking a breath test utilizing the model #4011A Intoxilyzer. The 4011A Intoxilyzer has a specific operation checklist, established by the Iowa Department of Public Safety, Division of Criminal Investigation, which reads as follows:

1. Turn "Power" switch to "ON" and wait for green "Ready Light" to come on (if instrument is off).

2. Observe subject for at least 15 minutes prior to testing. The subject may not smoke, eat or drink for at least 15 minutes before testing.

3. Turn mode selector to "Zero Set", depress "Zero Adjust" and adjust to read non-minus .000, .001, .002, or .003.

4. Place evidence card in card printer, connect air hose to breath hose, turn mode selector to "Air Blank" and allow instrument to run through cycle.

5. Turn mode selector back to "Zero Set" and readjust "Zero".

6. Turn mode selector to "Calibrator", place Calibration filter in slot and allow instrument to run through cycle.

7. Calibration reading _____ Filter Value _____

8. Remove Calibration filter. Turn mode selector to "Air Blank", and allow to run through cycle.

9. Turn mode selector to "Breath" mode. Disconnect air hose from breath hose, insert disposable mouth piece in breath hose, instruct subject to blow into mouthpiece for as long as possible. Green "Breath" light will turn on when proper sample is being given.

10. Breath Alcohol Concentration (grams Alcohol/210 liters Breath) 0.____

11. Reconnect air and breath hoses, turn selector to "Air Blank", and allow instrument to run through cycle.

Officer Brinkmeyer was appropriately trained in the operation of the 4011A Intoxilyzer.

During the first two attempts to secure a reading, which normally would include a visual numerical reading and a printed numerical reading on an evidence card, the Intoxilyzer did not print the numerical level on the evidence card, although, there was evidence the green sample light was on and a sample of air was being given. According to the state's witness, Bob Monserrate, the failure to secure a print out on the evidence card was directly attributable to either an insufficient sample being given or to the fact that the level of alcohol in the samples was rising. Mr. Monserrate testified that no print out would be obtained until a non-increasing level of alcohol was detected.

At the end of the second test, Officer Brinkmeyer completed step 11, which allowed the "air blank" to be run through the machine, and a .00 readout was secured on the evidence card. However, since the 4011A did not produce a printout on the evidence card for step 10, the second test was discarded. Officer Brinkmeyer then proceeded to run the test for a third time, Steps 1 and 2 had previously been completed. After completing Step 3, Officer Brinkmeyer proceeded with Step 4 but failed to place an evidence card into the machine until after the "air blank" test had been completed. Officer Brinkmeyer testified that the reading was .00 but, since he was late in placing the evidence card in the machine, the reading was not printed on the evidence card. The evidence suggested

that the filter was within tolerances, in other words, no alcohol residue was within the cell. According to Mr. Monserrate, if the filter had not been within tolerances the filter value would have been off and an error light would have come on. The evidence suggests that this was not the case here.

After Officer Brinkmeyer completed the Calibration steps, he then ran the "air blank" required by step 8 and received a reading of .00. Next, the Officer requested that the Defendant breath [sic] into the Intoxilyzer. When the Defendant did so, his Blood Alcohol Concentration was found to be .177. After the Defendant gave his sample, the officer ran the "air blank" test required by step 11 and once again received a reading of .00.

ANALYSIS

The Defendant claims that this Court misapprehended, misapplied, or misunderstood state law when it found that the results of the Defendant's Intoxilyzer were admissible. Specifically, the Defendants argue that *State v. Geinzer,* 406 N.W.2d 457 (Iowa App. 1987) and *State v. Wolfe,* 369 N.W.2d 450 (Iowa App. 1985) control in this instance and require that the State prove both procedural compliance with the Department of Public Safety's operational checklist as well as the reliability of the test results. Since Officer Brinkmeyer did not place the evidence card into the machine before running Step 4 of the checklist, the Defendant argues that the state cannot show procedural compliance with the operational checklist.

As noted in this Court's previous ruling, in all of the Iowa cases involving deviations from the operational checklist, the only time Iowa Courts have found the tests to be inadmissible was when the deviations actually compromised the accuracy of the tests in one way or another. In the case at bar, however, the State has established that the accuracy of the test results was in no way affected by the fact that Officer Brinkmeyer placed the evidence card in the 4011A Intoxilyzer after running the air blank in step 4. The evidence, in fact, suggests that Officer Brinkmeyer properly calibrated the machine and that it was functioning properly when the Defendant gave his sample. This is supported not only by the testimony of the state's witnesses but also by the fact that the evidence card reflects that the Intoxilyzer registered and printed a .00 reading immediately before and after the Defendant's sample was given. As such, this Court remains convinced that test results are admissible and that the Defendant's Motion to Suppress was properly denied.

ORDER

IT IS THE ORDER OF THE COURT that the Defendant's Motion to Reconsider and/or Enlarge Ruling is hereby DENIED.

IT IS SO ORDERED this 7th Day of July, 2000.

/s/ James Birkenholz
JAMES BIRKENHOLZ,
JUDGE
Fifth Judicial
District of Iowa

IN THE IOWA DISTRICT COURT
FOR POLK COUNTY

STATE OF IOWA,	*	
Plaintiff,	*	**Criminal No. OM50793**
	*	**STIPULATION TO MINUTES OF TESTIMONY AND FINDING OF GUILT**
v.	*	
STEVEN DEVRIES,	*	
Defendant.	*	
	*	
	*	

NOW ON 8-23-2000 the Defendant appears in open Court in person and with his attorney Joseph Bertogli. Defendant enters into a stipulation to the minutes of testimony to the charge of **OPERATING A MOTOR VEHICLE WHILE UNDER THE INFLUENCE OF ALCOHOL OR A DRUG, THIRD OFFENSE** in violation of Iowa Code Section 321J.2.

The Court finds the Defendant guilty of the charge of **OPERATING A MOTOR VEHICLE WHILE UNDER THE INFLUENCE OF ALCOHOL OR A DRUG, THIRD OFFENSE** in violation of Iowa Code Section 321J.2.

The Fifth Judicial District Department of Corrections is order [sic] to submit a presentence report by one week prior to the date set for sentencing below. The defendant is to be evaluated as part of the PSI for placement at the community OWI facility. Defendant is to call EFR at 243-4200 within three (3) days to make an appointment for a substance abuse evaluation.

Except where the Defendant is in custody, s/he shall report to the Fifth Judicial District Department of Correctional Services, 1000 Washington Street, Des Moines, Iowa, within two (2) days for the purpose of an interview for such presentence report.

Presentence conference is set on 10 31-2000@9:00 a.m. Sentencing will immediately follow the presentence conference.

Bond is continued. Defendant (~~IS~~ – IS NOT) in the Polk County Jail.
Defendant's SS# is: 483-80-2666. Defendant's date of birth is: 6-3-61.

/s/ Carol S. Egly
JUDGE OF THE FIFTH JUDICIAL DISTRICT

IN THE IOWA DISTRICT COURT
FOR POLK COUNTY

STATE OF IOWA, **Plaintiff,**	**Crim. No. OM50793**
v. **STEVEN DEVRIES,** **Defendant.**	**OWI SENTENCING ORDER** **PRISON SENTENCE IMPOSED**

NOW on 11-2-00, the defendant appears in open Court and with his attorney Joe Bertogli this being the date and time set for sentencing.

The record shows the defendant previously plead guilty to the charge of **OPERATING A MOTOR VEHICLE WHILE UNDER THE INFLUENCE OF ALCOHOL OR A DRUG, THIRD OFFENSE**, in violation of Section 321J.2, the Code of Iowa.

The Court has received and studied the pre-sentence report and afforded counsel and the defendant an opportunity to examine the report. On inquiry made, no legal cause has been shown why sentence should not be pronounced.

IT IS THE JUDGMENT OF THE COURT that the defendant is adjudged guilty of **OPERATING A MOTOR VEHICLE WHILE UNDER THE INFLUENCE OF ALCOHOL OR A DRUG, THIRD OFFENSE**, in violation of Section 321J.2, the Code, and shall be imprisoned for a period not to exceed FIVE (5) years as provided by Iowa Code Sections 902.9(4) and 902.3. In addition, defendant is to be given credit for time served and is ordered to pay a fine of $2500.00 plus a thirty percent (30%) surcharge.

IT IS ORDERED that the defendant is committed to the custody of the Directory of the Iowa Department of Corrections for his determination of the appropriate place of confinement, all as provided by Sections 902.3, 902.9(4) of the Code of Iowa.

IT IS FURTHER ORDERED that the defendant shall be held in the county jail pending transfer to the Department of Corrections.

Granting of probation in this case is denied because it is unwarranted in order to protect the public from further criminal activity by the defendant, because of defendant's prior criminal history and because it would unduly lessen the seriousness of the offense.

As required by Code Section 321J.2, the Defendant's driver's license shall be revoked by the Iowa Department of Transportation and the defendant shall remain ineligible for a new license for six (6) years.

The defendant's term of incarceration may be reduced by as much as half of the maximum sentence because of statutory good conduct time, work credits and program credits. The defendant may be eligible for parole before the sentence is discharged.

Defendant is to receive credit for time already served. Costs are taxed to the Defendant.

Bond is set at $10,000 cash only. Mittimus to issue: 11-2-00.

/s/ Carol S. Egly
JUDGE OF THE FIFTH JUDICIAL DISTRICT

IN THE SUPREME COURT OF IOWA

No. 00-1843

Polk County No. OWOM050793

ORDER

(Filed Feb. 08, 2002)

STATE OF IOWA,
Plaintiff-Appellee,

vs.

STEVEN B. DEVRIES,
Defendant-Appellant.

After consideration by this court en banc, Ternus and Streit, JJ., not participating, further review of the above captioned case is denied.

Dated this 8th day of February, 2002.

THE SUPREME COURT OF IOWA

By /s/ Louis A. Lavorato
Louis A. Lavorato,
Chief Justice